BANK OF TOKYO-MITSUBISHI (MALAYSIA) BHD

v.

SIM LIM HOLDINGS BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI JC
[CIVIL SUIT NO: D4(D9)-23-2442-88]
27 FEBRUARY 2001

CIVIL PROCEDURE: *Service - Foreign defendant - Service on local firm on behalf of - Whether service proper - Whether service permissible by virtue of O. 11 r. 5 Rules of the High Court 1980 - Whether irregularity of service waived by the filing of unconditional appearance and statement of defence*

CONTRACT: *Guarantee - Demand for payment - Notice of demand - Validity - Service of notice on address not as stipulated under guarantee agreement - Maker of notice not called to testify in court - Whether a valid demand*

EVIDENCE: *Documentary evidence - Documents marked as 'ID' - Whether admissible evidence - Whether court empowered to admit them by virtue of s. 73A(2) Evidence Act 1950*

EVIDENCE: *Documentary evidence - Certificate of indebtedness - Whether conclusive evidence of amount due and owing to bank*

CONTRACT: *Guarantee - Certificate of indebtedness - Interpretation of "for the time being is due" - Whether conclusive evidence of the amount due and owing for the time being as at date stipulated therein*

This was the plaintiff's claim against the second and third defendants as guarantors for an outstanding sum owing under an overdraft facility taken by the fourth defendant with the plaintiff. The claim against the first defendant guarantor was withdrawn after the plaintiff accepted a sum of money from the first defendant as settlement. The second defendant was the chairman of the fourth defendant whilst the third defendant was the director concerned. Further, the second defendant was the father of the third defendant.

The issues were: (i) whether service on a local firm Messrs HMJ Shaharom & KS Wee was proper as the second and third defendants were residents of Singapore; (ii) whether the notices of demand were inadmissible as they were sent to the wrong address and the makers of the related documents were not called to testify in court; (iii) whether the sum stated in the certificate of indebtedness was correct; and (iv) whether the second defendant who did not

appear in court as he was ninety years old and therefore too old to travel to court, was liable under the guarantee agreement executed between the parties concerned ('the guarantee').

Held:

[1] The service on Messrs HMJ Shaharom & KS Wee who had indicated to the plaintiff that it had instructions to accept service of the writ of summons and statement of claim on behalf of the second and third defendants ('both the defendants') was permissible by virtue of O. 11 r. 5 Rules of the High Court 1980 ('RHC'). Thus, the writ of summons and statement of claim were duly served on both the defendants. Further, the filing of the unconditional appearance and statement of defence by both the defendants was a positive step in the action and clearly indicated that any irregularity of service (if any) was no longer an issue.

[2] Under cl. 15 of the guarantee, the plaintiff was entitled to send the notice of demand to any other address of both the defendants last known to the plaintiff. The last known address might differ from the one stated in cl. 1 of the guarantee. As there was no indication that the plaintiff was informed of the change of their residential address, it was only fitting that the plaintiff sent the notices to the address of the holding company to ensure that both the defendants as directors of its subsidiary would receive it.

[3] It was totally impractical to call the makers of the documents to testify in court. Undue delay and expense would be caused. Section 73A(2) of the Evidence Act 1950 provides for the admittance of documents when the maker is not called if having regard to all the circumstances of the case the court is satisfied that undue delay or expense would otherwise be caused.

[4] Although the documents were marked as 'ID', it did not stop the court from deciding on their admissibility. Section 73A(2) of the Evidence Act 1950 empowers the court to do so at any stage of the proceedings having regard to all the circumstances of the case.

[5] In *Bangkok Bank Ltd v. Cheng Lip Kwong* it was held that so long as the certificate of indebtedness stated a date and the amount due and owing as at that date, it is conclusive evidence of the amount due and owing "for the time being" at the date mentioned therein. In this case, the certificate of indebtedness certified the amount due and owing under the fourth defendant's account as at 30 November 2000. In line with the above decision, it is conclusive evidence of the amount due and owing "for the time being" at the date mentioned therein.

[6] The debt or amount due and owing changes everyday due to interest accrued and it is only proper for the certificate of indebtedness to show the latest outstanding amount as at the date nearest to the date of the trial. Further, the plaintiff had sufficiently established and proved the outstanding amount in the said certificate.

[7] It is an acceptable norm and practice for lending institutions to claim interest on money lent. As such, even though the guarantee did not specify a rate of interest, the plaintiff should not be disallowed from claiming interest. Further, both the defendants at all material times were directors of the fourth defendant. They must have had knowledge of the company's borrowings and debts. Also, the fourth defendant never contested the interest rate stipulated in the statement of account when sent to it. Further, it was not stipulated in the guarantee that any variation of interest rate should be conveyed to the guarantors.

[8] The submission that there was a difference in the overdraft account number was not raised in the statement of defence. As such, that submission should be rejected as parties are bound by their pleadings and only issues which are confined to pleadings can be allowed by the court.

[9] Section 73A(1) of the Evidence Act 1950 deals with the admissibility of "any statement made by a person in a document" and "production of the original document" to establish certain facts. In this case, there was no document tendered or produced on behalf of the second defendant. Further, the evidence adduced by the third defendant on behalf of the second defendant was hearsay and inadmissible. The second defendant had also not produced a witness statement sworn on oath as evidence in court. Thus, the second defendant's defence was a bare allegation which carried no weight and on the balance of probabilities, judgment should be entered against the second defendant on that point alone. If wrong otherwise, the arguments and considerations applicable to the third defendant applied to the second defendant as well.

[Judgment entered against second and third defendants as per the amended statement of claim.]

Case(s) referred to:

Bangkok Bank Ltd v. Cheng Lip Kwong [1990] 1 CLJ 1017 ***(refd)***
Ban Hin Lee Bank Bhd v. Jashbhai Nagjibhai Patel [1992] 1 CLJ 98 ***(refd)***
Chung Khiaw Bank Ltd v. Bhojwani & Anor [1990] 2 MLJ 146 ***(refd)***
Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 ***(refd)***
Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd [1996] 1 CLJ 141 ***(foll)***
Ng Lai Tien v. Peregrine Finance Ltd [1996] 2 CLJ 496 ***(foll)***
Tengku Ali Ibni Almarhum Sultan Ismail v. Kerajaan Terengganu Darul Iman [1994] 2 MLJ 83 ***(foll)***

Legislation referred to:
Evidence Act 1950, ss. 32(1)(b), 73A(2), (5), (6)
Rules of the High Court 1980, O. 6 r. 6(1), O. 10 r. 1(3), O. 11 rr. 1(1)(f), 5, O. 12 r. 6

For the plaintiff - Prema Joseph; M/s Hamzah Sulaiman & Partners
For the 2nd & 3rd defendants - WT Ling; M/s Lee Ling & Partners

Reported by Usha Thiagarajah

JUDGMENT

Ramly Ali JC:

Background Of The Case

The plaintiff is a banker carrying on business at No. 1, Leboh Ampang, Kuala Lumpur. The 4th defendant, at all material times, is the customer of the plaintiff. Pursuant to the terms and conditions of an overdraft agreement dated 3 April 1980, the plaintiff had agreed to grant to the 4th defendant (and the 4th defendant had agreed to accept) an overdraft facility with a credit limit of RM300,000. The said overdraft facility is a revolving and continuing facility ie, the customer may continue to over draw from its current account as long as it is within the credit limit and regular repayments are made. The 1st defendant had executed a corporate guarantee for the credit limit of RM100,000 on 18 April 1980. The 2nd and 3rd defendants had on the same date (18 April 1980) executed a joint and several guarantee which was limited to RM700,000 for **all sums of money owing to the plaintiff on any account of the 4th defendant.**

Subsequently, the plaintiff had *vide* a letter dated 28 March 1986 renewed the credit limit of the overdraft facility to RM150,000 and granted Letters of Credit (LC) and Bills of Receivables (BR) for a credit limit of RM200,000 to the 4th defendant.

The 4th defendant who is the principal borrower defaulted in paying the outstanding amount owed to the plaintiff under the facilities and as a result the plaintiff had *vide* a letter dated 27 April 1988 to the 4th defendant withdrew the said facilities. As guarantors, the 1st, 2nd and 3rd defendants had failed to settle on demand the outstanding amount owed under the Principal Borrower's account (ie, the 4th defendant's account).

The plaintiff then initiated civil action against all the 1st, 2nd and 3rd defendants, to recover the outstanding balance. Subsequently, the Principal Borrower was added to the action as the 4th defendant by an amendment to the writ and statement of claim.

On 18 December 1989, the plaintiff entered judgment-in-default of defence against the 4th defendant for RM185,486.54 as prayed in para. 5(a) of the amended statement of claim. On 11 September 1990 the plaintiff withdrew the action against the 1st defendant after accepting RM30,000 as full and final settlement as regards to its claim against the 1st defendant only. The present proceeding that went on for hearing only relates to the plaintiff's claim against the 2nd and 3rd defendants only.

Both the 2nd and 3rd defendants are residents of Singapore. The 2nd defendant was the chairman and the 3rd defendant was the director of the 4th defendant, when the said guarantee agreement was signed on 18 April 1980 by both of them. Both of them were with the 4th defendant until late 1980's. The 2nd defendant is the father of the 3rd defendant. According to the 3rd defendant, his father (2nd defendant) is now 90 years old, residing in Singapore and is "too old to attend court". Thus the 2nd defendant did not appear in court for the hearing. Only the 3rd defendant appeared in court for the hearing and gave evidence. He is the only witness for the defence.

The 3rd defendant did not dispute the overdraft agreement dated 3 April 1980. Being a director of the 4th defendant, he was aware of the said overdraft agreement with a credit limit of RM300,000. The 3rd defendant also did not dispute the guarantee agreement dated 18 April 1980 which was signed by him and his father (2nd defendant). These were confirmed by the 3rd defendant in his cross-examination.

Issues Raised By The 2nd And 3rd Defendants

Basically, there are three (3) main issues raised by the 2nd and 3rd defendants in their submissions, namely:

i) preliminary issue – ie, that the writ of summons should have been served on the 2nd and 3rd defendants outside jurisdiction, in Singapore;

ii) that the plaintiff has failed to prove that a valid demand was made to the 2nd and 3rd defendants before the writ of summons was filed; and

iii) that the sum stated in the Certificate of Indebtedness was incorrect.

Service Outside Jurisdiction

The counsel for the 2nd and 3rd defendants submitted that since both the 2nd and 3rd defendants, at the material times, were residing in Singapore and their address for service as stated in the guarantee agreement is at No. 19, Gilstead Road, Singapore, this means the writ of summons must be filed and served pursuant to O. 11 r. 1(1)(f) and O. 6 r. 6(1) of the Rules of the High Court (RHC) 1980 where it requires leave of the court. The counsel argued that since

the writ of summons filed against the 2nd and 3rd defendants at c/o Sim Lim Holdings Berhad (1st defendant), it is bad in law because it is an attempt to circumvent the jurisdiction of the court for service out of jurisdiction pursuant to O. 11 r. 1(1)(f) and O. 6 r. 6(1) RHC and it is also in breach of terms of the guarantee for service of documents. The counsel also argued that since the plaintiff had elected to serve the notice of demand in ID21 & ID23 out of jurisdiction ie, in Singapore, then it is estopped from filing the writ against both the 2nd and 3rd defendants in Kuala Lumpur.

According to the court's records (encl. 25), the plaintiff was, on 18 July 1989, granted leave to issue a notice of writ of summons against the 2nd and 3rd defendant and to serve the said notice on it at no. 19, Gilstead Road, Singapore 1130 or elsewhere in Singapore. On 14 September 1989, the plaintiff made a request (*vide* encl. 32) for service of the relevant documents on both the 2nd and 3rd defendants at No. 19, Gilstead Road, Singapore 1130 or elsewhere in Singapore, through the judicial authority of Singapore. All the relevant documents were forwarded to the Chief Registrar's office on 19 October 1989 (*vide* encl. 33) to be submitted to the judicial authority of Singapore on 4 November 1989. On 8 February 1990 the plaintiff's counsel wrote to the court (*vide* encl. 37) to take back all the relevant documents because Messrs. H.M.J Shaharom & K.S Wee had written to them informing them that they have instructions to accept service of the writ of summons and statement of claim on behalf of the 2nd and 3rd defendants. Thus on 13 March 1990, at 10.40am the plaintiff had served on the solicitors for the 2nd and 3rd defendants, Messrs. H.M.J Shaharom & K.S Wee of No. 27 – 1A, 1st Floor, Wisma Sri Muda, Jalan Raja Muda Abdul Aziz, 50300 Kuala Lumpur, a copy of the sealed writ of summons and statement of claim. Pursuant to the same, Messrs. H.M.J. Shaharom & K.S Wee had on 13 March 1990 duly acknowledged receipt of the documents on behalf of the 2nd and 3rd defendants. Accordingly, on 21 March 1990 (encl. 44) the 2nd and 3rd defendants had entered and filed in court a memorandum of appearance to defend through their solicitors, Messrs. H.M.J Shaharom & K.S. Wee. Later, both the 2nd and 3rd defendants filed in their statements of defence.

Based on those records of the proceeding, I am satisfied that the plaintiff had complied with the relevant requirements relating to service out of jurisdiction particularly O. 11 r. 1(1)(f) and O. 6 r. 6(1) RHC. In the circumstances, it is only proper for the plaintiff to call back all the relevant documents and served them on Messrs. H.M.J. Shaharom & K.S. Wee who had indicated to the plaintiff's counsel that they have instructions to accept service of the writ of summons and statement of claim on behalf of the 2nd and 3rd defendants. This is permissible under O. 10 r. 1, RHC, which is applicable to this case by virtue of O. 11 r. 5 RHC. To my mind, the writ of summons and statement of claim were duly served on both 2nd and 3rd defendants.

If at all the documents were not duly served, the writ shall be deemed to have been duly served on the defendants as both of them had entered an unconditional appearance in the action on 21 March 1990 (encl. 44). The format used in encl. 44 is as per Form 15 ie, for unconditional appearance. Order 10 r. 1(3) RHC (which is applicable to the present case by virtue of O. 11 r. 5 RHC) provides:

> (3) Where a writ is not duly served on a defendant but he enters an unconditional appearance in the action begun by the writ, the writ shall be deemed to have been duly served on him and to have been served on the date on which he entered the appearance.

If at all the 2nd and 3rd defendants had intended to challenge the jurisdiction of the court, they should have entered a **conditional** appearance, by using Form 16, pursuant to O. 12 r. 6 RHC, and to be followed by an application to have the suit set aside. These were not done. The filing of the unconditional appearance by the 2nd and 3rd defendants on 21 March 1990 tantamount to a submission to the jurisdiction of this court and they have waived their rights to raise any objections as to the issue of lack of jurisdiction of the court or irregular service. In *Tengku Ali Ibni Almarhum Sultan Ismail v. Kerajaan Negeri Terengganu Darul Iman* [1994] 2 MLJ 83, it was held that:

> By filing an unconditional appearance to the suit, the defendant was precluded from raising the issue of the court's lack of jurisdiction. A host of authorities show that if the defendant is mindful of challenging the jurisdiction of the court, he is to enter a conditional appearance as opposed to an unconditional one, which would be followed by some form of application to have the suit set aside. The method adopted by the defendant in this case was clearly tantamount to a submission to the jurisdiction of the court.

In our present case, the 2nd and 3rd defendants had not only filed their memorandum of appearance but filed their statement of defence. This is a positive step in the action and clearly indicates that any irregularity of service (if any) is no longer an issue. Both the defendants have therefore waived their rights to raise any objection as to the service of the writ of summons and statement of claim. *In Ng Lai Tien v. Peregrine Finance Ltd.* [1996] 2 CLJ 496, it was held that:

> The appellant had entered an unconditional appearance and filed his statement of defence. These could be construed adversely against the appellant in that there had been a waiver on his part to any objections which he might have had on the question of jurisdiction. The appellant had by his conduct submitted to the jurisdiction of the Malaysian court.

Also in *Development & Commercial Bank Bhd. v. Aspatra Corp. Sdn. Bhd.* [1996] 1 CLJ 141, it was held that:

> ... if a person becomes aware of an irregularity of service and subsequently takes a further step in the action which could only be useful if the service had been good, the irregularity is waived. As Lorrain had applied for leave to file an appearance and statement of defence, this clearly indicated that the irregularity of service was a matter of the past and no longer an issue.

Thus, based on the records of proceedings as well as the above authorities, I have no hesitation to hold that the 2nd and 3rd defendants' preliminary issue on service out of jurisdiction ie, in Singapore is clearly baseless and without merit. It should not be entertained.

Whether A Valid Demand Was Made To The 2nd And 3rd Defendants Before The Writ Was Filed

The 2nd and 3rd defendants contended that the plaintiff had failed to prove that a valid demand was made to them before the writ was filed. Thus their liabilities under the guarantee do not arise and the plaintiff's action must be dismissed with costs. The counsel for the 2nd and 3rd defendants submitted that liability of a guarantor arises only on demand made. It is a condition precedent to a cause of action that no liability arises until demand is made.

In this sense, I agree with the counsel for the 2nd and 3rd defendants that the liability of the 2nd and 3rd defendants, as guarantors, arises only on demand made. The said guarantee at exh. P6 also provides that "the guarantor agree to pay and satisfy the bank on demand made".

The question now is whether there was any valid demand made to the 2nd and 3rd defendants before the writ was filed?

According to the plaintiff, three (3) notices of demand were sent to each of the 2nd and 3rd defendants, namely:

i) *vide* a letter dated 16 July 1988 (exh. P15 and AR Cards: P16 A-C);

ii) *vide* a letter dated 17 August 1988 from plaintiff's solicitors (ID17 and ID19 and respective AR Cards: ID18 and ID20);

iii) *vide* a letter dated 18 February 1989 from plaintiff's solicitors (ID21 and ID23 and respective AR Cards: ID22 and ID24).

On the other hand, the counsel for the 2nd and 3rd defendants argued that the first notice of demand is irrelevant and not valid as it was not pleaded in the statement of claim; the second notice of demand is hearsay and inadmissible; and the third notice of demand is also hearsay and inadmissible.

The purpose of a notice of demand is to ensure that the guarantor has notice and knowledge of the claim against him.

First Letter Of Demand Dated 16 July 1988 (Exh. P15)

The first letter of demand dated 16 July 1988 was written by the plaintiff to the 2nd and 3rd defendants. The letter was introduced by PW1 during his examination-in-chief, the AR Cards were also tendered. The said letter and AR Cards were accordingly marked as P15 and P16A, P16B and P16C. From the records of the proceedings (at p. 11, notes of evidence) the counsel for the 2nd and 3rd defendants had indicated that he had no objection to it. The counsel for the 2nd and 3rd defendants did not ask anything during cross-examination of PW1 on this issue. Under the circumstances, I am of the opinion that the plaintiff had led relevant evidence which was agreed upon by the counsel for the defendants and accepted by the court as exhs. P15, P16A, P16B and P16C. Once evidence is led in court and not objected to by the defendant's counsel, it is deemed to be admitted in court.

Second And Third Notice Of Demand (ID17 – ID19 and ID21 – ID23)

In respect of these two notices of demand which were sent to the 2nd and 3rd defendants by the plaintiff's solicitors, the 2nd and 3rd defendants argued that both the notices were invalid and inadmissible on grounds that:

i) they were sent to a wrong address (not as stated in the guarantee agreement); and

ii) the maker of the notices was not called to testify, as such they are considered as "hearsay" and inadmissible.

The same argument goes to the admissibility of the AR Cards – ID18 – ID20 and ID22 – ID24:

Address For Service Of Notice

In cl. 1 of the guarantee (exh. P6) both the 2nd and 3rd defendants gave their address as: **No. 19, Gilstead Road Singapore 1130**. Clause 15 of the said guarantee provides:

> Any notice or demand hereunder shall be deemed to have been sufficiently given if sent by prepaid post to the address in ... last known to you or stated hereon of the one of us to whom or to whose personal representatives such notice is given and shall be assumed to have reached the address in the course of post.

Under the above cl. 15, the plaintiff is entitled to send the notice of demand to any other address last known to the plaintiff (besides the address stated in cl. 1 ie, No. 19, Gilstead Road, Singapore 1130). It is up to the plaintiff to make its own enquiry to trace the whereabouts of the defendant at the time when notice of demand is to be sent out or to come to a conclusion what is

the latest or last known address of the defendants. The latest or last known address of the defendants may differ from that of the one stated in cl. 1 of the guarantee. There is no necessity for the plaintiff to explain to the court why the said notice of demand was not sent to the address stated in cl. 1. Also, there is no necessity for the plaintiff to explain what is the relationship between the guarantor and his last known address. To hold otherwise would be detrimental and unfair to bankers or financial institutions in their effort to enforce the guarantee against the guarantor in the event the principal borrower failed to honour their loan agreements. In most cases, the guarantors are directors of the company which was granted the loan facility by the bank. They are businessmen. They travel a lot. Sometimes they change their residence within as well as outside the country. In most cases they never inform the bank if they change their residential address. Our present case is a good example. At the time when the guarantee was signed on 18 April 1980, both the 2nd and 3rd defendants had given their residential address at No. 19, Gilstead Road, Singapore 1130. That was confirmed by the 3rd defendant (DW1) in his evidence. When he gave evidence in court on 10 January 2001, the 3rd defendant gave his address as: 10A, Swanage Road Singapore 437201. In his evidence, he said he had been staying at the above address for the past ten (10) years. Before that he was staying in Hong Kong for seven (7) years. In other words since 1984, (17 years ago) the 3rd defendant had not been staying at the address given in cl. 1 ie, No. 19, Gilstead Road, Singapore 1130. There is no indication that he had informed the plaintiff about his change of residential address. The 2nd defendant, according to the 3rd defendant, had moved out to No. 23 Gilstead Road, Singapore. Again, there is no indication that he had informed the plaintiff of his change of residential address.

Under such circumstances, it is very unfair to expect the plaintiff to send the relevant notice to the same address as stated in cl. 1 of exh. P6 if the defendants had left the place to another unknown whereabout. The notice of demand P15, ID17, ID19, ID21 and ID23 were sent out in 1988. There was a lapse of eight (8) years between the execution of the guarantee and the issuing of the notices. Given the circumstances, it was only fitting that plaintiff sent the notices to the address of the holding company ie, the first defendant, to ensure and to hope that the 2nd and 3rd defendants as directors of its subsidiary (ie, the 4th defendant) would receive it. The fact that the said notices were sent to the said address, shows that the said address was the last known Malaysian address of the 2nd and 3rd defendants.

Calling Of The Maker Of The Notice

The counsel for the 2nd and 3rd defendants contended that the second and third notice of demands (ID17 – ID19 and ID21 – ID23) were only marked as 'ID' and the maker of the documents were not called to give evidence. He

argued that as such the notices are "hearsay" and inadmissible. The effect of the defendant's submission is that the solicitor who drafted the notices of demand on behalf of the plaintiff must be called to give evidence and to tender the said notice before they can be accepted as evidence. On the same token, the postman who delivered the notices and later accepted the signed copy of the relevant AR Cards must also be called to testify in court and to produce each and every one of the relevant AR Cards and Certificate of Posting (ID18 – ID20 and ID22 – ID24).

I just cannot imagine if this things really happened. Solicitor or lawyer who, in his professional capacity has been issuing notice of demand almost everyday has to came to court to testify and produce the said notices of demand as exhibit. Postman, whose ordinary duty is to deliver letters, would also be lining up in the court's witness room waiting to be called to give evidence and to produce all the AR Cards which they had been handling. To my mind, what the defendants wish to achieve through their submission is totally not practical. Undue delay and expense would be caused.

The notices of demand are issued by solicitors or lawyers on behalf of their clients in their ordinary course of business. The AR Cards and certificates of posting are issued by postman in their ordinary course of business. To call them to testify in court may cause undue delay or expense which under the circumstances appears to be unreasonable. As such, by virtue of s. 32(1)(b) of the Evidence Act 1950, the statements contained in those documents are relevant facts.

Section 73A(2) of the Evidence Act 1950 provides for the admittance of documents when the maker is not called, if having regard to all the circumstances of the case the court is satisfied that undue delay or expense would otherwise be caused. In doing so, the court may draw any reasonable inference from the form or contents of the document or from any other circumstances. This is provided under s. 73A(5) of the same Act.

The relevant parts of s. 73A(2) and (5) reads as follows:

> (2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence:
>
> a) notwithstanding that the maker of the statement is available but is not called as a witness; and

b) notwithstanding that the original document is not produced, if, *in lieu* therefore, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of subsection (1) to (4), the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances.

(6) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

Therefore, by virtue of the above provisions of law, I am satisfied that the said notices of demand (ID17 – ID19) and (ID21 – ID23); the AR Cards (ID18 – ID20) and Certificates of Posting (ID22 – ID24) are admissible as evidence. All these documents are part of a transaction or records which are consistent, and were issued in the course of business and discharge of professional duty. The court can see the genuinity of these documents without the makers being called.

By virtue of s. 73A(5) and 73A(6) of the same Act, in deciding whether all these documents are admitted, the court had also considered the reasonable inference from the form and contents of the document as well as from any related circumstances, as to the accuracy or otherwise of the statement and in particular to the question whether or not the statements or the documents were made contemporaneously with the occurrence or existence of the facts stated.

The counsel for the 2nd and 3rd defendants also submitted that all those documents are only marked as "ID" and thus only for identification purposes and are not admissible evidence. I cannot agree with the counsel on that point. From the records of the proceedings, it seems that the plaintiff had attempted to produce all those documents as evidence but was objected to by the counsel for the 2nd and 3rd defendants. Thus, the court had to decide on the admissibility of all those documents at the end of the trial after hearing all the relevant circumstances of the case. At that stage of the proceedings, all those documents have to be marked as "ID" first, but it does not stop the court from deciding on their admissibility at the end of the trial ie, during submissions stage. Section 73A(2) of the Evidence Act 1950 empowers the court to do so. The said subsection provides for the exercise of the power "at

any stage of the proceedings, having regards to all the circumstances of the case". There is nothing to say that those documents cannot be admitted as evidence under s. 73A(2) just because they have only been marked as "ID".

Based on the above considerations, I am satisfied that all the three (3) notices of demand namely P15, ID17, ID19, ID21 and ID23 and their respective AR Cards and Certificates of Posting ie, P16 A-C, ID18, ID20, ID22 and ID24 are admissible as evidence for the purpose of the guarantee dated 18 April 1980 executed by both the 2nd and 3rd defendants. However, for the purpose of this proceeding, only one (1) notice of demand is sufficient against each of the 2nd and 3rd defendants, to trigger their respective liabilities under the said guarantee.

Is The Sum In The Certificate Of Indebtedness Correct And Conclusive

The defendants contended that the Certificate of Indebtedness (exh. P10) is not correct and not conclusive, as there are manifest errors on the face of the certificate. The defendants submitted that they have shown that the Certificate of Indebtedness (P10) contains at least three (3) errors on the face, namely:

i) amount in the certificate differs from the amount in the notices of demand ID21 and ID23.

ii) account no: 0032 is different from account no: 100072;

iii) bills outstanding cannot include Trust Receipts for RM37,556.38 and interest on Suspense Account for RM90,597.25 which was abandoned in para. 4 of the statement of claim; and interest chargeable at 9% Suspense Account on the guarantors.

Clause 16 of the guarantee (exh. P6) provides:

> A Certificate by an officer of the Bank as to the money and liabilities **for the time being due** or incurred to you **from or by the customer** shall be conclusive evidence in any legal proceedings against us or any of us or against our personal representatives or against our successor in title.

Firstly, it can be clearly construed from the above cl. 16 that all the plaintiff is required to do is to produce a certificate signed by its officer which states the amount under the 4th defendant's account which **for the time being is due**.

For the interpretation of the words **"for the time being is due",** I shall refer to the case of *Bangkok Bank Ltd. v. Cheng Lip Kwong* [1990] 1 CLJ 1017 where it was held that:

(2) By its very nature, a certificate issued by a bank to certify an amount due to it "for the time being" never refers to an amount which may be owing in the future, but to an amount due to it at a date, present or past, to which reference is being made.

(3) The fact is that in business and commerce, there are many instances when provisions are inserted into contracts by which the contracting parties agree that a designated person will have the power to issue a certificate as evidence of a fact, and the issue by him of the certificate is then conclusive evidence of that fact, as between the parties.

Further at p. 9, the court held that:

> ... So long as the certificate states a date and the amount due and owing as at that date, it is conclusive evidence of the amount due and owing "for the time being" at the date mentioned in the statement.

In our present case, the Certificate of Indebtedness (P10) dated 30 November 2000 certifies the amount due and owing under the 4th defendant's account as at 30 November 2000. In line with the above decision, as long as P10 states a date (ie, 30 November 2000) and the amount due and owing as at that date, it is conclusive evidence of the amount due and owing "for the time being" at the date mentioned therein. The defendants' argument that the amount as shown in the letters of demand (ID21 and ID23) differs from the amount stated in the Certificate of Indebtedness (P10) does not necessarily mean that there are manifest errors on the face of the certificate. This is because interest rates are calculated daily and as a result the amount owing increases daily. The amount stated in the letters of demand (ID21 and ID23) as at 1 August 1988 would definitely differ from the amount in the Certificate of Indebtedness as at 30 November 2000, as there is a lapse of twelve (12) years. Since the Certificate of Indebtedness is to be used for the purpose of any legal proceedings, it is only proper and appropriate that the bank issue the latest or most up-to-date Certificate of Indebtedness. It is not necessary to certify the amount which appeared in the letters of demand (which were issued 12 years ago) into the Certificate of Indebtedness and if done so, would only serve to confuse and complicate the statement of account as appears in the Certificate of Indebtedness. The debt or amount due and owing changes everyday due to interest accrued, and thus, it is only proper for the Certificate of Indebtedness to show the latest outstanding amount as at the date nearest to the date of trial for the information of the court.

The defendants also argued that the amounts claimed by the plaintiff were incorrect especially relating to Bills Outstanding, Trust Receipt and Interest on Suspense Account. I think the plaintiff does not have to go beyond boundaries to establish the outstanding amount in the Certificate of Indebtedness. The plaintiff has sufficiently by way of the Certificate of

Indebtedness and by calling PW1 and PW2 to give oral testimony, established and proven the correctness and truth of the Certificate of Indebtedness. In *Chung Khiaw Bank Ltd. v. Bhojwani & Anor* [1990] 2 MLJ 146, it was held that:

> ... the defendants argued that the amount claimed was incorrect. They said that the amount shown in the statement of claim were different from what the plaintiff had informed them earlier on various dates. The simple answer to this is that the interest rates were calculated over a different period of time. The amounts reflected in the statement of claim which was filed on 17.1.1985 included interest for the period up to 8.1.1985 whereas the debit notes sent by the plaintiffs to the defendants reflected interest for different periods of time. In any case the conclusive evidence clause in cl. 17 of the guarantee would surely put the matter beyond argument.

The purpose of the Certificate of Indebtedness is to create conclusive evidence and to dispense with legal proof of the actual indebtedness of the guarantor (as in this case). The defendants are bound to accept the Certificate of Indebtedness duly executed by an officer of the plaintiff, as conclusive evidence of the debt due to the bank. In *Citibank N.A. v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282, the Federal Court held:

> In the present case the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. Clause 19 provides thus "A Certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives". It means that, for the purpose of fixing liability of the respondents the company's indebtedness may be ascertained conclusively by a certificate: see *Dobbs v. National Bank of Australasia Ltd.* [1935] 53 CLR 643; *Bache & Co v. Bargue Vernes* [1973] 2 LLLR 437. In the circumstances the respondents are bound under Clause 19 to accept the certificate of indebtedness duly executed by the Assistant Vice-President of the bank. On this footing the bank would be entitled to judgment as prayed for.

In *Dobbs'* case, the High Court of Australia said that:

> The Clause means what it says, that the certificate of the balance due to the bank by the customer shall be conclusive evidence of his indebtedness to the bank.

The defendants also alleged that the plaintiff had not proved to the court that the plaintiff had notified the defendants that 9% interest had been imposed on the guarantee. Defendants also alleged that the guarantee (exh. P6) did not specify the rate of interest.

I am of the view that even though the guarantee (exh. P6) did not specify a rate of interest, the plaintiff should not be disallowed from claiming interest merely on this ground. It is an acceptable norm and practice for lending institutions to claim interest on money lent. In *Ban Hin Lee Bank Bhd v. Jashbhai Nagjibhai Patel* [1992] 1 CLJ 98, Mohamed Dzaiddin Abdullah J (now CJ) held that:

> Although the issue as to the omission of the rate interest was not pleaded, it was an important point. The fact that the rate of interest is left blank does not preclude the plaintiff from claiming interest as per the statement of claim as it was provided in the letter of guarantee that the interest rate could be determined by the plaintiff at a lower or higher rate from time to time. Further the monthly statement of accounts which were sent to the principal debtor were not contested or queried by the guarantors.

In our present case, both the 2nd and 3rd defendants, at the material times, were directors of the 4th defendant, ie, the principal borrower. Being directors of the company, they must have knowledge of the company's borrowings and debts. All these informations can be obtained from the company's account which must be tabled before the Board of Directors, before being tabled at the general meeting every year. Both the 2nd and 3rd defendants must be deemed to have knowledge of the matters. In the same case *(Ban Hin Lee Bank Bhd. v. Jashbhai Nagjibhai Patel (supra))*, the court also held that:

> It may be argued that the monthly bank statements were not sent to the guarantors. However, the Defendant being a director of the principal debtor must be deemed to have knowledge of the company's borrowing and debt.

In our case, the 4th defendant, ie, the principal borrower never contested the interest rate stipulated in the statement of accounts sent to them. In fact the 4th defendant never ever filed a statement of defence to challenge and dispute the plaintiff's claim in this suit. As a result, a judgment-in-default was entered against the 4th defendant on 18 December 1989.

On the question that the plaintiff had failed to notify the 2nd and 3rd defendants that 9% interest had been imposed, I am of the view that this allegation is without merit. The guarantee (P6) does not stipulate that any variation of interest rate need to be conveyed to the guarantors. Only the overdraft agreement, ie, exhs. D25, D26, D27, P1 and P2 which have been executed between the plaintiff and the 4th defendant as the principal borrower require the plaintiff to inform the 4th defendant of any variation of interest.

The 2nd and 3rd defendants also alleged that there is only one (1) overdraft account operated by the 4th defendant as the principal borrower. The account no: 0032 is different from account no: 100072. This issue was not raised in the statement of defence. It is trite law that parties are bound by their pleadings

and only issues which are confined to pleadings can be allowed by this court. Thus, this submission should be rejected. During cross-examination of PW2, he was asked by the defendant's counsel to confirm that the account numbers 0032 and 100072 were appearing in the overdraft agreement dated 12 February 1965 (D25) and the Certificate of Indebtedness (P10) respectively (p. 23 Notes of Evidence). That's all. PW2 was not asked to elaborate on that point especially on why there are two account numbers for the 4th defendant. The plaintiff could not see what the defence counsel was aiming to achieve by that single question relating to the account numbers. Therefore the difference in these two account numbers were not clearly explained. In any event the account number as stated in the Certificate of Indebtedness (P10) should be conclusive and accepted by the court.

In view of the above, I am satisfied that there was no evidence of fraud or manifest error on the face of the Certificate of Indebtedness. Therefore the Certificate of Indebtedness (P10) is conclusive and both the 2nd and 3rd defendants are bound by it. In *Bangkok Bank Ltd. v. Cheng Lip Kwong (supra)* it was said:

> The widespread use by banks of 'conclusive evidence' clauses had risen simply because of the dictates of commerce. What is significant is that, in the absence of fraud or obvious error on the face of it, a certificate issued under a 'conclusive evidence' clause is conclusive of both the liability and the amount of the debt.

Liability Of The 2nd Defendant

The 2nd defendant at all material times was the chairman of the 4th defendant. He is the father of the 3rd defendant who is residing in Singapore. He did not appear in court. Therefore there is no direct evidence given by him to support his statement of defence. The plaintiff's counsel argued that the 2nd defendant's failure to appear in court obliterated the plaintiff's right and opportunity to cross-examine him in court. The counsel further submitted that all evidence given by the 3rd defendant on behalf of the 2nd defendant is hearsay and to be disregarded.

The 3rd defendant (DW1) had testified that the 2nd defendant is 90 years old and too old to travel. That's why he could not attend court.

The defendant's counsel submitted that the 2nd defendant's presence in court can be excused under s. 73A(1) of the Evidence Act 1950, ie, if the maker of the statement is unfit by reason of mental conditions to be present as a witness or if he is beyond the seas.

I do not agree with that submission. Section 73A(1) deals with admissibility of "any statement made by a person in a document" and "production of the original document" to establish certain facts. In our present case there is no document to be tendered or produced by or on behalf of the 2nd defendant. What is happening here is that the 3rd defendant (DW1) had given oral evidence to the effect that his father (the 2nd defendant) had not received any notice of demand from the plaintiff or its solicitors. From DW1's own evidence, he confirmed that they are not staying together for the past 17 years. DW1 was in Hong Kong for seven years and in Singapore (at a different address) for 10 years. Under the circumstances, I agree with the plaintiff's counsel that the evidence adduced by DW1 that the 2nd defendant had not received any notice of demand from the plaintiff is hearsay and inadmissible. As such there is no evidence at all, adduced by the 2nd defendant to defend his case. Furthermore, the 2nd defendant had not even produced in court a witness statement sworn on oath as evidence. Thus the 2nd defendant's defence is a bare allegation which carries no weight in court. Therefore, on the balance of probability, judgment should be entered against the 2nd defendant on this point alone.

However, in the event I am wrong on this point, the 2nd defendant's position can be considered along the same line of considerations as for the 3rd defendant. In that case, all the above arguments and considerations are applicable to both the 2nd and 3rd defendants as well.

Conclusion

In the premise, I have no hesitation to hold that:

i) the writ of summons and statement of claim was duly served on both the 2nd and 3rd defendants;

ii) there was a valid notice of demand made to the 2nd and 3rd defendants before the writ of summons was filed;

iii) the sum stated in the Certificate of Indebtedness is correct and conclusive; and

iv) both the 2nd and 3rd defendants are liable under the guarantee for the outstanding sum claimed by the plaintiff.

On that footing, I enter judgment for the plaintiff against both the 2nd and 3rd defendants as per the amended statement of claim (encl. 103) with cost.